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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

TIMOTHY DANE MOORE,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

CHARLES A. GRADDICK
ATTORNEY GENERAL OF ALABAMA

JAMES F. HAMPTON
SPECIAL ASSISTANT
ATTORNEY GENERAL OF ALABAMA

ADDRESS OF COUNSEL:

McLAIN AND HAMPTON
567 South Hull Street
Montgomery, Alabama 36104
(205) 262-0336

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QUESTIONS PRESENTED

I. Whether the Alabama Courts denied the Petitioner any constitutional right to due process by their ruling below that the affidavit that was made in order to secure a search warrant was constitutionally sufficient.

II. Whether the Petitioner's failure to raise the question of sufficiency of evidence through the use of a directed verdict results in a waiver of the right to present these issues for the first time on appeal.

PARTIES

The caption contains the names of all parties to the proceedings in the Courts below.

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OPINIONS BELOW

1. The Opinion of the Alabama Court of Criminal Appeals, published at ____So.2d ____ (Ala. Cr. App. 1983), is found at page 34 of the Petitioner's brief presented to this Court as an Appendix to said brief.

2. A Petition for a Writ of Certiorari from the Supreme Court of Alabama was denied, without opinion, on December 16, 1983.

JURISDICTION

The jurisdiction of this Court is invoked by the Petitioner pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is advancing his claim under the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The Petitioner Moore was indicted by the Montgomery County Circuit Court, Alabama in July, 1982, on the charge of possession of a controlled substance in violation of Code of Alabama, 1975 §20-2-70(a).

After several hearings on motions to suppress the Petitioner waived his right to a trial by jury and was allowed to submit the case to the trial judge upon a stipulation of facts (See Appendix "D" of Petitioner's brief). Based on these facts the Petitioner was found guilty and sentenced under Alabama law.

The Petitioner gave notice of and filed an appeal with the Alabama Court of Criminal Appeals which issued an opinion on July 5, 1983 (See Appendix "A" of Petitioner's brief). That opinion effectively affirmed the conviction of the Petitioner by the trial court below.

After a petition for writ of certiorari to the Alabama Supreme Court the Petitioner filed for a stay in order to prepare a similar

petition for consideration by this Court.

In response thereto the Respondent offers this brief and argument.

REASONS FOR DENIAL OF THE WRIT

I. THE ALABAMA COURTS MADE NO ERROR AND DID NOT DENY THE PETITIONER ANY CONSTITUTIONAL RIGHT TO DUE PROCESS BY THEIR RULING BELOW THAT THE AFFIDAVIT THAT WAS MADE IN ORDER TO SECURE A SEARCH WARRANT WAS CONSTITUTIONALLY SUFFICIENT.

In beginning this argument the Respondent would note that the test mentioned by the Petitioner in brief of Aguilar v. Texas, 378 U.S. 108 (1964) is of little relevance in this case. The present fact situation does not deal at all with an informant and therefore the tests of Aguilar is not relevant to the issues at hand. Spinelli v. United States, 393 U.S. 410 (1969). Nevertheless, it should be noted that the Petitioner's already weak argument concerning this matter is further weakened by the recent decision of this Court in Illinois v. Gates, ____ U.S. ____ 1983.

Because of the facts which led up to the securing of this search warrant before Judge Miller are clearly and distinctly set out in

the opinion of the Court of Criminal Appeals of Alabama below (See Appendix "A" of Petitioner's brief). The Respondent will not again set out the factual events of this case.

Clearly, any reading of that factual scenario indicates that the affidavit in this case was based upon what the affiant had actually heard and seen transpire during the course of his surveillance and investigation. Probable cause is concerned with probabilities that are not technical; they are the factual and practical considerations of every day life on which reasonable and prudent men, not legal technicans, act. Brinegar v. United States, 338 U.S. 160, 175 (1949). Clearly, the affidavit in this case which was used to secure the search warrant contains definite statements as to when the activity took place, that cocaine, marijuana and qualudes were involved and the time sequence was fresh and directly related to this Petitioner as the supplier.

The Respondent in this cause would argue before this Honorable Court that the Petitioner's reliance on State v. McManus, 243 N.W.2d 575 (Iowa, 1976) is misplaced. Any reading of that case in comparison with the facts of the case at bar will lead to the conclusion that the two fact situations are distinguishable.

As stated by the Court of Criminal Appeals of Alabama in its opinion the fact of the visit by the dealer to the defendant's home is "extremely significant in finding the existence of probable cause." As noted therein there is significant authority for such consideration. State v. Hudd, 619 P.2d 1947, 1053 (Ariz. App. 1980); State v. Watson, 550 P.2d 89 (Ariz. 1976); State v. Urrutia, 539 P.2d 913 (Ariz. App. 1975).

It is respectfully urged that if this Court deems it proper to consider the merits of this case that such a review should be based on a practical and realistic approach to

the problems at hand. There can be little doubt that the Petitioner can make an argument that it is entirely possible that the dealer in this case did not obtain the contraband from the defendant but rather had it on his person or in his possession at all times. However, such a possibility does not realistically consider the very real probability (based on these facts and circumstances) that this dealer went directly to the defendant's home to secure the goods. Any reasonable person knowning the facts at hand would have concluded that the dealer left the potential buyer, went non-stop to the defendant's home and returned with the contraband to make the sale. Clearly, such does give rise to a finding of probable cause on behalf of the officers involved in this investigation.

There can be absolutely no question that the affidavit in this case was sufficient to support the issuance of the search warrant herein. There was no denial of due process

or equal protection in regard to the issuance of this warrant.

II. THE PETITIONER'S FAILURE TO RAISE THE QUESTION OF SUFFICIENCY OF EVIDENCE INCLUDING PROOF OF SPECIFIC INTENT OR KNOWLEDGE CONCERNING THE EXISTENCE OF THE CONTRABAND IN HIS OWN HOME THROUGH THE USE OF A MOTION FOR DIRECTED VERDICT RESULTS IN A WAIVER OF THE RIGHT TO PRESENT THESE ISSUES FOR THE FIRST TIME ON APPEAL.

The Respondent in this matter has combined its argument in response to Petitioner's issue II-IV because of the similarity of issues and the brief response needed to cover the matters raised therein.

In addition, the Respondent would note that much of the argument concerning the necessity of this Court to review such issues is also applicable to the first issue raised by the Petitioner in his brief.

In that regard the Respondent would note that none of the issues raised in this brief (especially issues II-IV) are of any particular significance. They have a limited application and lend themselves only to the

particular facts of this case. None of these issues is likely to have a significant effect on current court trends or upon a significant amount of other people.

In speaking directly to the question of the sufficiency of the evidence and/or the proof of "mens ray" in this cause it is clear that the Petitioner has never raised these matters prior to his appeal. While this Court will not have the record of the trial before it, it is admitted by the Petitioner in his brief that he did fail to file a motion for directed verdict or any other such motion which questioned the sufficiency of the evidence or the proof of the specific elements of the crime for which he was indicted. Neither was there any motion for new trial which raised such matters. It was only after the trial of this case and after the initial appeal and opinion of the Alabama Court of Criminal Appeals below (See Appendix "A" of Petitioner's brief) that the Petitioner chose to raise this

issue. A review of the Court of Criminal Appeals opinion indicates that such was never raised and therefore never addressed by that Court. Obviously, any attempt to insert an objection concerning a trial court ruling or lack thereof came too late if mentioned for the first time on appeal.

Under Alabama law it is clear that matters not objected to at trial cannot be considered on appeal, even where constitutional questions are involved. Moore v. State, 415 So.2d 1210, 1217 (Ala. Cr. App. 1982); Wood v. State, 416 So.2d 794 (Ala. Cr. App. 1982); Fagan v. State, 412 So.2d 1282 (Ala. Cr. App. 1982).

The Respondent in this case sees no added significance by the raising of these three issues in the context of a denial of equal protection argument (See Petitioner's brief page 28). Regardless of how the issue or issues are framed it is clear that the Petitioner himself waived the right to bring these matters before this Court at this time.

He cannot and should not be allowed to waive his objections and/or motions at trial and then gamble on the verdict thinking that he will raise them later before Courts such as this.

Clearly, no violation of the Petitioner's rights resulted from any action by the trial court below.

CONCLUSION

Based on the foregoing argument the Respondent would submit that the writ of certiorari requested by the Petitioner in this case is due to be denied.

Respectfully submittted,

/s/ Charles A. Graddick
CHARLES A. GRADDICK
ATTORNEY GENERAL OF
ALABAMA

/s/ James F. Hampton
JAMES F. HAMPTON
SPECIAL ASSISTANT
ATTORNEY GENERAL OF
ALABAMA

CERTIFICATE OF SERVICE

I, James F. Hampton, a Special Assistant Attorney General for the State of Alabama, a member of the Bar of the Supreme Court of the United States and one of the attorneys for the State of Alabama, Respondent, do hereby certify that on this the _____ day of March, 1984, I served three copies of the foregoing Brief and Argument in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Alabama on the attorney for Petitioner by placing same in the United States Mail, postage prepaid and properly addressed as follows:

Mr. Timothy Dane Moore, pro se
Route 1, Box 251-A
340-B Buford Street
Montgomery, Alabama 36107

/s/ James F. Hampton
JAMES F. HAMPTON
SPECIAL ASSISTANT
ATTORNEY GENERAL OF
ALABAMA

McLain and Hampton
567 South Hull Street
Montgomery, Alabama 36104
(205) 262-0336